APPEAL NO. 030723
FILED MAY 9, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was commenced on January 15, 2003, and concluded on February 26, 2003. The hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on March 29, 1999, with a 5% impairment rating (IR) as assessed by the Texas Workers' Compensation Commission (Commission)-appointed designated doctor whose report was not contrary to the great weight of other medical evidence.

The claimant appeals, contending that spinal surgery "was under active consideration on the date of statutory [MMI]" and that he reached MMI on April 1, 2002, with a 42% IR as assessed by his treating doctor. Also in the file before us is a letter dated March 27, 2003 (four weeks after the CCH), from Dr. S, the claimant's current treating doctor in support of the claimant's position. We decline to consider that letter, as we are limited in our review to the record at the CCH, appeal, and response. *See* Section 410.203. The respondent (self-insured) responds, urging affirmance.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable low back injury on _____. The claimant continued to work for about three weeks and the hearing officer comments, that "May 26 [1998] will be treated as the first day of disability." The claimant was examined by Dr. F, apparently a self-insured independent medical examination (IME) doctor, who in a report dated December 28, 1998, certified the claimant at MMI on June 8, 1998, with a 0% IR using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides).

Dr. P[1] was the Commission-appointed designated doctor, who on a Report of Medical Evaluation (TWCC-69) and narrative dated March 29, 1999, certified MMI on that date with a 5% IR based on Table 49 Section (II)(B), page 73 of the AMA Guides. Dr. P invalidated range of motion (ROM), and testing found no motor or sensory deficits. Apparently the claimant's then treating chiropractor disagreed with that assessment. The claimant's then attorney requested that the Commission seek clarification from the designated doctor regarding a possible herniated disc at L1-L2 and suggested a 7% IR. The Commission sent that request to the designated doctor who, in a letter dated April 27, 1999, confirmed his 5% IR pointing out "unexplainable, exaggerated responses" by the claimant during testing. In evidence is a recommendation for spinal surgery dated April 30, 1999, by a Dr. M, but that procedure apparently was not approved or performed.

[1]Dr. P is not related to any member of the Appeals Panel.

The claimant apparently began treating with Dr. S in August of 2000, and the spinal surgery process was restarted. The claimant was eventually approved for spinal surgery and a laminectomy and fusion with instrumentation was performed on February 5, 2002. A second spinal surgery was performed on December 5, 2002, to remove the instrumentation and do a second fusion.

On a TWCC-69 dated April 1, 2002, and narratives dated July 31 and September 23, 2002, Dr. S assessed MMI on April 1, 2002, with a 42% IR. How the IR was calculated is not clear other than apparently 30% impairment was based on various loss of ROM, which "would also be added to the specific impairment already given as well as neurologic deficit."

Section 408.104 provides for extension of statutory MMI if the employee has had spinal surgery, or has been approved for spinal surgery under Section 408.026 and Commission rules, within 12 weeks before the expiration of the statutory MMI. There is no evidence that any such request was made nor is there any evidence that the designated doctor was asked for clarification at any time after April 1999.

Sections 408.122(c) and 408.125(e) of the 1989 Act provide that the report of a designated doctor determining the date of MMI and the claimant's IR shall have presumptive weight and the Commission shall base its determination on such report, unless the great weight of other medical evidence is to the contrary. We have held that the designated doctor's report should not be rejected absent a substantial basis for doing so. Texas Workers' Compensation Commission Appeal No. 960897, decided June 28, 1996. There is no evidence that any effort was made to obtain the designated doctor's opinion after spinal surgery was performed and we hold that Dr. S's reports do not constitute the great weight of other medical evidence contrary to the designated doctor's report. We do however reject the carrier's notion that the IR should be a "snapshot" of the claimant's condition on the date of MMI.

In this case, we conclude that the hearing officer did not err in his decision and that the decision is not so against the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

CITY SECRETARY
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Thomas A. Knapp
Appeals Judge

CONCUR IN THE RESULT:

I concur in the result based on the presumptive weight to be given to the designated doctor's opinion.

_____
Robert W. Potts
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. It is apparent that the claimant is arguing that the designated doctor's IR is incorrect because it does not take into account his spinal surgeries. The fact that the spinal surgeries occurred after statutory MMI does not mean that they are not properly considered in determining the IR. *See* Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002, and Texas Workers' Compensation Commission Appeal No. 022618, decided November 27, 2002. Thus, I believe that the claimant has raised a valid argument that the designated doctor's IR is incorrect because it does not consider two spinal surgeries that were approved in the workers' compensation system and are undeniably treatment for the claimant's compensable injury. In my opinion, it is of no consequence that no effort was made to obtain the designated doctor's opinion as to the claimant's IR following the surgeries. The fact that the claimant asked for the incorrect relief, i.e., that we adopt his treating doctor's IR, rather than asking to be reexamined by the designated doctor, does not, in my view, eliminate the validity of his challenge to the designated doctor's IR. To the contrary, I believe it is incumbent upon the Commission to take the appropriate action to ensure that the claimant's IR properly reflects the impairment resulting from his compensable injury. Thus, I would remand the case to have the

designated doctor reexamine the claimant and determine his IR taking into consideration the effects of the two spinal surgeries.

_____
Elaine M. Chaney
Appeals Judge